IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN,

JAIPUR BENCH, JAIPUR.

S. B. CIVIL MISC. APPEAL NO. 1701/2006

Saboo Sodium Chloro Ltd.

Versus

Sambhar Salts Ltd & Ano.

Date of Judgment: 25th January, 2007.

HON'BLE MR. JUSTICE R. S. CHAUHAN

Mr. Sagar Mal Mehta, Sr. Advocate with
Mr. Anil Mehta for the Appellant
Mr. Rajendra Arora, for the Respondents.

(Per Court):

Reportable

The appellant is challenging the Order dated 10-5-06, passed by the District and Sessions Judge Jaipur whereby the learned Judge has rejected the objections filed under Section 34 of the Arbitration and Conciliation Act, 1996 (henceforth to be referred to as 'the Act', for short) by the appellant against the award dated 24-8-2000 passed by the Sole Arbitrator.

The brief facts of the case are that the appellant and the respondent No. 1 had entered into a contract whereby the

respondent No. 1 had agreed to supply 30,000 Metric Ton (MT) plus or minus 15% of “kyar salt” to the appellant @ of Rs. 394/- PMT (per Metric Ton). The said salt was to be duly loaded into trucks in loose. The contract was for a period of one year, namely from 1-8-96 to 31-7-97. The prices were firmed and no escaltation provision during the currency of the contract was envisaged. As per Clause 8 of the Contract an Earnest Money deposit amounting to Rs. 2,00,000/- was to be furnished in the shape of Bank Guarantee by the appellant to the respondent No. 1. The appellant had deposited the said Earnest Money with the respondent No. 1. According to the contract, the appellant was required to lift 2500 MT in each month effective from 1-8-96. The said contract also contained an arbitration clause—Clause No. 11, which is as under:

> *In the event of any question, dispute, breach of difference arising up or in connection with this contract the same shall be referred to the Sole Arbitration of the Chairman and Managing Director, Sambhar Salts Ltd, Jaipur or a person appointed by the Chairman and Managing Director to act as Arbitrator in the matter. There will be no objection if the Arbitrator is an employee of the Company, its holding Company or his duties as an employee expressed views on all or any of the matters in the dispute or difference. The award of the Arbitrator shall be final and binding on the parties to this Contract. The expenditure on the arbitration shall be borne by the party who invokes the Arbitration Clause.*

It seems the appellant did not adhere to the lifting schedule and lifted only 5694.804 MT out of a total of 30,000 MT, which they were, supposed to lift within the period of one year. Since the appellant did not lift the entire amount as required by the contract, the respondent No. 1 had to necessarily sell off the salt to other

buyers. However, the respondent were forced to sell the salt at a reduced rate of Rs. 368/- PMT to M/s PNFC Ltd. Chandigarh @ Rs. 368/- till February 1997 and @ Rs. 365/- PMT since March 1997. In total, the respondent No. 1 sold 23,300.80 MT to the PNFC Ltd. Since the agreed price with the appellant was Rs. 394/- PMT, and since the respondent No. 1 was forced to sell the said salt at a reduced price, it consequently suffered a loss of Rs. 6.50 lacs. Vide letters dated 4-7-97 and 1-8-97, the respondent No. 1 invoked the arbitration clause against the appellant. The respondent No. 1 sent the said letters to the appellant. In terms of Clause 11, it appointed Mr. R. Prakash, the then Chairman and Managing Director as the Sole Arbitrator. Vide notice dated 24/27- 9-99, the learned Sole Arbitrator informed respondent No. 1 to submit its claim petition and also informed the appellant to submit its written statements within twenty days from the date of the receipt of the claim petition. However, the respondent No. 1 sought further time for filing the claim petition through its application dated 20/21-10-99. The claim petition was eventually filed on 3-12-99. According to the claim petition, the respondent No. 1 had invoked the Bank Guarantee of Rs. 2 lacs, but the respondent No. 1 was still entitled to recover Rs. 4.50 lacs from the appellant as the appellant had breached the contract. Thus, in total the respondent No. 1 claimed that it was entitled to a compensation of Rs. 6.50 lacs along with 18 % interest per annum. In order to substantiate its case, the respondent No. 1

had submitted thirty-one documents. During the course of the arbitration proceeding, the learned Sole Arbitrator, due to pre-occupation as the Salt Commissioner and as the Chairman and Managing Director of Hindustan Salts Ltd and of its subsidiary, Sambhar Salts Ltd., thought it proper to appoint Mr. M. P. Pareek in his place as the Sole Arbitrator. Mr. M. P. Pareek, the new Sole Arbitrator decided to hold the arbitration proceeding on 27-1-2000. Information about the holding of the proceeding was also sent to the appellant. However, on 27-1-2000, the appellant neither appeared personally nor through a counsel before the Sole Arbitrator. Instead, it sent a letter dated 22-1-2000, wherein it stated that it is not agreeable for arbitration by any employee or representative of the Sambhar Salts Ltd. A copy of the said letter was also given to the respondent No. 1. The respondent sought time to reply to the said letter. On 27-1-2000 itself, the respondent No. 1 pointed out to the Sole Arbitrator that the appellant had accepted the contract which contained the arbitration clause. According to Clause 11 of the contract, the parties could not object if the Arbitrator is an employee of the Company. Since the claim petition had already been filed, since a copy of the claim petition had already been sent to the appellant, according to the respondent No. 1, it was too late for the appellant to raise any objection about the appointment of the new Sole Arbitrator. After hearing the respondent No. 1 and in the absence of the appellant, the new Sole

Arbitrator rejected the objection raised by the appellant and continued the arbitration proceedings. The arbitrator had drawn up the proceedings of 27-1-2000, had sent a copy of the proceedings to the appellant. He had informed the appellant that the case is fixed for further hearing and for filing of written statement for 11-2-2000. However, again on 11-2-2000, the appellant was absent. Since the Sole arbtirator wanted to do complete justice with the parties, he adjourned the proceedings till 13-3-2000 and informed the appellant about holding the proceeding on day-to-day basis so as to complete the proceeding at the earliest. But, even on 13-3-2000, no one appeared on behalf of the appellant. Therefore, the Sole Arbitrator decided to proceed ex-parte against the appellant. He framed four issues as under:

1. Whether the allegations made by the Non-Applicant regarding supply of bad quality of salt are correct and who is responsible for the breach of Contract between the parties i.e. to say the applicant or the non-applicant?
2. Whether the Applicant is entitled to forfeit and retain the amount of Earnest Money Deposit of Rs. 2.00 lacs recovered by them after invoking the Bank Guarantee furnished by the Non-applicant in terms of contract between the parties?
3. Whether the applicant company has suffered a loss of Rs. 6.50 lacs on account of breach of contract and non-

lifting of salt as per scheduled programme as envisaged in the contract?

4. Whether the applicant is entitled for recovery of interest @ 18% p.a. On account of damages, if any, found recoverable from the award and from what date ?

All these four issues were decided in faovur of the respondent No.1 vide award dated 24.8.2000. The Sole Arbitrator decided that the respondent No.1 was entitled for recovery of Rs. 6.50 lacs by way of damages from the appellant. However, as an amount of Rs. 2 lacs had already been withheld on account of earnest money deposited by the appellant, the appellant was directed to make the payment of Rs. 4.50 lacs to the respondent No.1 within a period of one month from the date of the award alongwith an interest of 18% p.a. According to the award, a copy of the said award was sent to the appellant.

But, according to the appellant from the very beginning it had no information that the respondent No.1 had appointed Mr. R. Prakash, the then Chairman and Managing Director as the sole arbitrator. Moreover, it had no information that the arbitration proceedings commenced against it. The appellant claims that for the first time it came to know that an arbitration proceedings were continuing against it when it received a letter informing them about the change of the sole arbitrator from Mr. R. Prakash to Mr. M.P. Pareek. The appellant immediately sent a letter, mentioned above, about its unwillingness to continue the proceedings before the new sole arbitrator. Furthermore, the appellant claims

that it never received a copy of the arbitration award dated 24.8.2000 from the arbitrator himself. Instead, a copy of the award was sent by the Hindustan Salts Ltd., to the appellant. The appellant further claims that it came to know about the factum of the award after execution proceedings were initiated by the respondent No.1 before the Addl. District Judge No.3, Jaipur Clity, Jaipur. Immediately the appellant asked the sole arbitrator for a copy of the award. But, the learned Sole Arbitrator told them to contact the Corporate Office, General Manager (P & A) and thus refused to supply a copy of award. The appellant moved an application under Order 1, Rule 10 of the Code of Civil Procedure (henceforth to be referred to as 'the Code', for short) for impleading the learned Sole Arbitrator as a party in the execution proceedings. However, the learned Judge dismissed the said application. Meanwhile the appellant filed his objections against the award under Section 34 of the Act. Vide order dated 10.5.06, the learned Judge has dismissed the objections. Hence this appeal before the Court.

Mr. S.M. Mehta, the learned counsel for the appellant, has raised two contentions before this Court; firstly, that according to Section 31(5) of the Act “after the arbitral award is made, a signed copy shall be delivered to each party”. However, according to him, so far no signed copy has been delivered by the learned Sole Arbitrator. Instead, a Photostat copy was sent by M/s. Hindustan Salts Ltd., who are totally stranger to the arbitration proceedings as the arbitration proceedings were between the appellant and respondent No.1. Secondly, according to Section 34(3) of the Act an application for setting aside the award may not be made after three months have elapsed from the date on

which the party making that application received the arbitral award. According to the learned counsel since copy of the arbitral award had not been received by the appellant, the limitation period stated in Section 34(3) has not commenced. Therefore, the learned Judge has erroneously held that the application under Section 34 was hit by limitation.

Secondly, Section 11 deals with appointment of arbitrators. And, Section 11(6) deal with the change in arbitrator during the arbitration proceedings. However, in the present case, the arbitrator has been changed by Mr. R. Prakash, the then Chairman and Managing Director, without following the procedure prescribed by Section 11(6). Since the procedure has not been followed, the appellant had sent the letter dated 22.1.2000 wherein the appellant had voiced his unwillingness to continue with the arbitration proceedings under the newly appointed sole arbitrator Mr. M.P. Pareek. However, despite the appellant's protest, the arbitration proceedings were continuedand eventually an ex-parte award was passed against it. Since the appointment of new Sole Arbitrator was illegal, the entire arbitration proceedings stands vitiated. In order to substantiate his case, the learned counsel has relied upon the case of U.O.l Vs. Tecco Trichy Engineers & Contractors (2005 (4) SCC 239), and Lachhuman Singh Vs. Maker Singh & Ors. (AIR 1954 Patna 27).

On the other hand, Mr. Rajendra Arora, learned counsel for the respondents, has vehemently argued that the word used in Section 31(5) of the Act is “delivered” and not “dispatched” by the arbitrator. Thus, what is pertinent is

that the copy of the award should be delivered to the appellant. Since both Sambhar Salts and Hindustan Salts Companies are in the same building and are under the same Chairman & Managing Director, a copy of the arbitrator award was sent by Hindustan Salts Ltd. through Registered A.D. The said Registered A.D. was received back after the copy of the award was delivered to the appellant. Infact, the issue whether the copy was duly served and was duly received by the appellant was decided by the Executing Court vide its Order dated 23.7.04. The executing court clearly held that a copy of the award was, indeed, received by the appellant. The said order has not been challenged by the appellant. Therefore, it has reached a finality. Hence, the appellant is estopped from raising the same issue afresh. Moreover, once the copy had been received by the appellant on 1.9.2000, the filing of the objections in the year 2004 was delayed by four years. According to Section 34(3) “an application against the arbitral award can be made within 120 days or 3 months from the date of the award. If the Court is satisfied that the appellant is prevented from sufficient cause from making the application within the said period of three months, it may entertain the application within a further period of thirty days, but not thereafter.” According to the learned counsel the said limitation period cannot be extended beyond the period prescribed by the proviso, as the proviso uses the word “but not thereafter”. Therefore, Section 5 of the Limitation Act dealing with condonation of delay is inapplicable to an application filed under Section 34 of the Act. In order to substantiate his contention, the learned counsel has referred to the case of U.O.I. Vs. Popular Construction Company (2001 (8) SCC 470).

As far as the second contention with regard to the appoint of the new sole arbitrator is concerned, the learned counsel has contended that the appellant could have raised an objection under Section 16(5) of the Act before the Arbitral Tribunal itself. But instead of substantially raising this question, it had merely sent a letter voicing its objection. Even after the said objection was rejected by the arbitrator on 27.1.2000, a further opportunity was given to the appellant to appear on 11.2.2000. However, the appellant singularly failed to appear on 11.2.2000. In fact, even on 13.3.2000 and 24.8.2000 it never appeared before the arbitrator to contest the arbitration proceedings. Therefore, after a lapse of four years from the date of the passing of the arbitral award, the appellant cannot be permitted to raise these issues. Lastly, according to the learned counsel the appellant is raising all these issues in order to delay the execution proceedings and in order to escape its liability of paying Rs. 4.50 lacs to the respondent No.1.

We have heard the learned counsels and have perused the impugned judgment and the award.

Section 31 deals with form and contents of arbitral award. Sub-section (5) of Section 31 states that “after the arbitral award is made, a signed copy shall be delivered to each party.” (Emphasis added). Thus the word is “delivered” and not the word “dispatched”. A distinction has to be made between these two words. According to the Shorter Oxford English Dictionary, the word “delivered” means “to bring and handover a letter, a parcel to the proper

recepient or address” and “in law it means to handover formally especially a sealed deed to the grantee”. Thus, what is important is that a copy of the award should be handed over to the proper recipient or address. The word “dispatch”, on the other hand, means “to send off to a particular destination or recipient for a particular purpose”. Therefore, sub-section (5) does not require that a copy of the arbitral award should be sent off by the arbitral Tribunal to the concerned parties. But it requires that a copy of the arbitral award be handed over to the proper parties. In the case of Tecco Trichy Engineers & Contractors (supra), the matter related to a huge organisation like the Southern Railways. Therefore, the Hon'ble Supreme Court held that “a copy of the award has to be received by the person who has knowledge of the proceeding and who would be the best person to understand and appreciate the arbitral award and also to take a decision in the matter of moving an application under sub-section (1) or (5) of Section 33 or under sub-section (1) of Section 34.....Therefore, in our opinion, service of the arbitral award on the General Manager by way of receipt in his inwards office cannot be taken to be sufficient notice so as to activate the department to take appropriate steps in respect of and in regard to the award passed by the arbitrators to constitute the starting point of limitation for the purposes of Section 34(3) of the Act.” Since the entire proceedings were conducted by the Chief Engineer, therefore, the service of the notice on the Chief Engineer was taken to be the starting point of the limitation to challenge the award in the court. However, in the instant case the grievance of the appellant is that the copy of the award was not sent by the sole arbitrator. His grievance is not that it has been received either by a wrong office or by a wrong officer. Therefore, the case of the

Tecco Trichy Engineers & Contractors(supra) is inapplicable to the facts of this case.

Moreover, arbitration award clearly reveals on the last page that a copy of the award was sent to the appellant. The said copy was sent by M/s. Hindustan Salts Ltd., through a Registered A.D. According to the Registered A.D., the copy of the award was received by the appellant on 1.9.2000. The issue about the non-receipt of the copy of the award was decided by the Executing Court vide its order dated 23.7.04. The appellant has not challenged the said order. Thus, the said order has achieved its finality. Therefore, the same issue cannot be raised now before this Court.

Furthermore, once the copy of the award was received by the appellant, the limitation period under Section 31(5) of the Act commenced. Admittedly, the objection against the award under Section 34 was not filed till 2004. Therefore, in the light of Section 34(3) of the Act, the application under Section 34 was hopelessly time-barred. In the case of Popular Construction Co., (supra) the Hon'ble Supreme Court held as under :-

> There is no dispute that the Arbitration & Conciliation Act, 1966 is a “special law” and that Section 34 prescribes for a period of limitation different from that prescribed under the Limitation Act....In the language of Section 34 of 1966 Act, the crutial words are “but not thereafter” used in the proviso to sub-section 3. In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act.

> Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase 'but not thereafter" wholly otiose. No principle of interpretation would justify such a result.
>
> The history and scheme of the 1996 Act support the conclusion that the time-limit prescribed under Section 34 to challenge an award is absolute and unextendible by could under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need "to minimise the supervisory role of courts in the arbitral process. This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention in no uncertain terms.
>
> Furthermore, Section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award "in accordance with" sub-section (2) and sub-section (3). But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application "in accordance with" that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that the award becomes enforceable as soon as the limitation period under Section 34 expires. This is a significant departure from the provisions of the Arbitration Act, 1940. Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act."

Therefore, once the appellant received a copy of the award on 1.9.2000, it had 120 days for filing the objection from the date of the receipt of the award, or in case it could satisfy the court, the period of limitation could be extended for a further period of thirty days but not thereafter. But, the appellant did not move an application under Section 34 within the said stipulated period. In fact, it moved the said application after four long years. Hence, the learned Judge

was legally justified in dismissing the objections on the ground of limitation itself.

According to Section 16 of the Act, a party aggrieved by the arbitral proceedings can raise an objection with the arbitral Tribunal, However, such an objection is to be raised prior to the submission of the statement of defence. In the instant case, the appellant had sent a letter dated 22.1.2000 wherein it had expressed its unwillingness to continue the arbitration proceedings before the newly appointed sole arbitrator Mr. M.P. Pareek. However, despite the proceeding drawn up on 27.1.2000 rejecting his contention, the appellant neither appeared before the arbitrator on subsequent dates nor challenged the arbitrator's rejection of his objections before a court. The appellant raised his objection for the first time before the learned District Judge in his application filed under Section 34 of the Act. The said objection could be raised only during the period of limitation. But the said objection has been raised after an inordinate delay of four years. Therefore, the appellant has missed the bus in raising the said objection.

In the result, this appeal has no force and it is hereby dismissed. There shall be no order as to costs.

(R.S. CHAUHAN) J.

MRG.